of passengers.[17] But there is a real difference in the way in which the two businesses are carried on. The carrier of goods usually handles them out of the sight of their owner. There is a danger that some fraud may be practiced on the latter. If there is an accident he is ignorant of the facts — he cannot easily sustain the burden of proving the carrier's negligence. These are the only rational considerations which warrant the imposing of a more onerous burden on the carrier of goods than on the carrier of passengers.[18] Where, then, the owner is present, these considerations are neutralized and the rule that the carrier is subject to an insurer's liability is totally without logical foundation.[19] This is as a fact true, when the owner accompanies his goods, and in such cases the carrier should be liable only for the results of its negligence. The cases, however, while recognizing that the rigor of the carrier's liability as an insurer should be relaxed in some cases in which the carrier does not have the exclusive control of the goods[20] have been unwilling to go so far.[21] On the other hand it should be noted that in many of the cases in which the carrier purport to hold the carrier strictly to an insurer's liability the carrier was in reality liable in any event because of its negligence.[22]

ALTERATION, CERTIFICATION, AND SUBSEQUENT *BONA FIDE* PURCHASE UNDER THE NEGOTIABLE INSTRUMENTS LAW. — A recent Illinois decision makes an important contribution to the interpretation of the Uniform Negotiable Instruments Law. A St. Louis bank drew

[17] Briefly these interests are on the one hand the interest of the operators of the carrier in obtaining a fair return on their investment and for their efforts, and the social interest in having them receive a fair return so that there will be an incentive to undertake to fill the social need for transportation facilities, and on the other hand the interest of those employing the carrier in the security of their persons — or in the case of carriage of goods in the security of their acquisitions — and the social interest in the preservation of the lives and health of the members of society — or in the case of goods in the conservation of economic wealth. As far as is possible the law tries to protect all of these interests. See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 343.

[18] How weak these considerations are is illustrated by the fact that a contract that a carrier shall be liable only for the results of its negligence is valid. Southern Ry. Co. *v.* Tollerson, 135 Ga. 74, 68 S. E. 798 (1910). But the policy underlying the rule that the carrier is liable for negligence is so strong that the parties cannot contract out of the duty to use due care. Railroad Co. *v.* Lockwood, 17 Wall. (U. S.) 357 (1873). But see Edwin C. Goddard, "Liability of the Common Carrier," note 2, *supra*.

[19] The result of the shipper's presence has the effect of lessening the carrier's burden in another class of cases. If there is a contract which relieves the carrier from its absolute liability, in the case of injury to goods unaccompanied by the owner, the carrier has the burden of showing facts that will bring it within one of the exceptions of the contract. See Terre Haute & L. R. Co. *v.* Sherwood, 132 Ind. 129, 31 N. E. 781 (1892). Where the owner accompanies the goods, the burden of showing negligence is thrown on him. Zimmerman *v.* Northern Pac. Ry. Co., 140 Minn. 212, 167 N. W. 546 (1918); Colsch *v.* Chicago, etc. Ry. Co., 149 Iowa 176, 127 N. W. 198 (1910); St. Louis, etc. Ry. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134 (1888).

[20] Yerkes *v.* Sabin, 97 Ind. 141 (1884); White *v.* Winnisimmet Co., 7 Cush. (Mass.) 155 (1851). See Bean *v.* Hinson, note 6, *supra*; Fierson v. Frazier, 142 Ala. 232, 37 So. 825 (1904); Sturgis *v.* Kountz, 165 Pa. St. 358, 30 Atl. 976 (1895). See HUTCHINSON, CARRIERS, 3 ed., § 1264. But see Hannibal R. *v.* Swift, note 9, *supra*.

[21] See cases cited, notes 6 and 20, *supra*. The English rule on the whole would seem to be stricter than that of most of the American cases. Great Western Ry. Co. *v.* Bunch, note 8, *supra*; Talley *v.* Great Western Ry. Co., note 11, *supra*; Le Couteur *v.* London, etc. Ry. Co., note 11, *supra*.

[22] See Bean *v.* Hinson, note 6, *supra*.

a draft on a Chicago bank, payable to a Pittsburgh manufacturer. The draft was stolen from the mails by one Manning, who skilfully erased the name of the payee, inserted his own, and indorsed the instrument. He tendered the draft in payment for some diamonds which he purchased; a certification was secured, and the jewels were thereupon turned over to him. The jeweler deposited the draft with the defendant bank; it was paid through the clearing house, and the drawee, having discovered the forgery, sought to recover the money paid. The Supreme Court of Illinois denied recovery.[1]

The act makes it clear that certification is in all respects equivalent to acceptance.[2] With that point settled, the common-law authorities, though not entirely clear, seem to have held that a *bona fide* purchaser of an accepted bill was protected, though the amount were altered before acceptance.[3] Is the result the same under the Negotiable Instruments Law? Under § 62 "the acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance." It would seem that the drawee accepted no other instrument than the one presented to him, — the altered form, — and that it, if any, is the instrument he engages to pay.[4] This engagement, it is true, was obtained through mistake and fraud; but these facts, under § 55, merely created defects in the title which are unavailing against a holder in due course.[5] But here arise two puzzling questions. First, has the drawee "accepted" so as to give rise to an engagement to pay? Acceptance, says the act, "is the signification by the drawee of his assent to the order of the drawer."[6] Second, when the name of the payee has been altered, and the indorsement is in the altered form, is the purchaser a holder in due course? The answers to both of these questions depend upon whether that which the drawee has certified and authenticated is the old instrument in an altered form, or a new instrument drawn by the forger. If it is a new instrument, the drawee has accepted by assenting to the order of the new drawer — the forger; and the purchaser is a holder in due course of the accepted instrument. If it is not a new instrument, that to which the drawee has assented is not the order of the drawer; nor is the purchaser a holder in due course, since he is not the indorsee of the original payee or his order. There can hardly be a new instrument while the old one is still subsisting. Hence the argument for the new instrument is that the old one was destroyed by the alteration; for by § 124, "where a negotiable instrument is materially altered . . . it is avoided,

[1] National City Bank of Chicago *v.* National Bank of the Republic of Chicago, 300 Ill. 103, 132 N. E. 832 (1921). For the facts of this case see RECENT CASES, *infra*, p. 763.

[2] N. I. L., § 187.

[3] Langton *v.* Lazarus, 5 M. & W. 629 (1839); Louisiana Nat. Bank *v.* Citizens Bank, 28 La. Ann. 189 (1876); Ward *v.* Allen, 2 Metc. (Mass.) 53 (1840). Cases often cited to the contrary are, upon analysis, only decisions to the effect that a certification does not amount to an acceptance. See Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67 (1874). Professor Melville M. Bigelow, in an article on "Alteration of Negotiable Instruments," 7 HARV. L. REV. 1, 7, 8, suggested that the rule stated in the text was not law, except where, as in Langton *v.* Lazarus, *supra*, and Ward *v.* Allen, *supra*, the alteration was made by the drawer. But this does not seem a sound basis for differentiation, when the authorities in the present note are placed on their proper basis.

[4] See BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW, 3 ed., 225.

[5] N. I. L., §§ 57, 58.

[6] N. I. L., § 132.

except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers." This part of the section was copied from the English Bills of Exchange Act, under which, following the English common law, alteration by a stranger destroyed the instrument.[7] The argument *contra* cites the second paragraph of § 124, by which "when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." This, it may be urged, embodies the American common law, by which alteration by a stranger did not destroy the instrument, and the holder at the time of alteration was still allowed to recover upon it.[8]

But all these arguments, though properly applicable, seem highly technical in the face of the practical facts that the drawee bank has authenticated an instrument in a certain form, and that commercial policy favors the protection of any one who, in due course, changes his position on the faith of that authentication. Hence the Illinois court, to protect the *bona fide* purchaser, seizes upon subsection 2 of § 62, whereby "the acceptor by accepting the instrument . . . admits . . . 2. The existence of the payee and his then capacity to indorse." This, they say, means the payee named in the altered instrument as presented for certification; and the estoppel — for it is just that — operates in favor of any indorsee of that named payee. But again we run into the technical questions: Has the drawee "accepted"? Does he "admit" to every one, or only to a holder in due course? Is the purchaser a holder in due course? To answer them we must revert to the involved suggestions in the preceding paragraph. To the court, the argument of practical commercial policy was evidently strong enough to absorb the difficulties and resolve the question in favor of the *bona fide* purchaser for value of the certified draft.

It is extremely important to distinguish the case outlined above from one where there has been no negotiation after acceptance — where the person from whom it is sought to recover payment, or against whom it is sought to defend an action on the acceptance, is the one who secured the acceptance or the payment without acceptance. Here there is no *bona fide* purchaser of the accepted instrument to cut off the defects of mistake and fraud. Should the drawee nevertheless be refused recovery of money thus paid under mistake of fact? That opens up the whole of the *Price* v. *Neal* controversy; the important thing to note is that *National City Bank* v. *National Bank of the Republic* can hardly be said to settle the effect of the act on the *Price* v. *Neal* situation, because of the intervention of the *bona fide* purchaser after acceptance. While the dictates of commercial policy may be the same in both situations,[9] they are, for the purposes of the act, distinctly different cases.[10]

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[7] Master *v.* Miller, 4 T. R. 320 (1791). See Davidson *v.* Cooper, 13 M. & W. 343 (1844). See James Barr Ames, "The Negotiable Instruments Law — Some Necessary Amendments," 16 HARV. L. REV. 255, 260–261.

[8] Bigelow *v.* Stilphen, 35 Vt. 521 (1863). See Piersol *v.* Grimes, 30 Ind. 129, 130 (1868); Presbury *v.* Michael, 33 Mo. 542, 543 (1863).

[9] See, *e.g.*, 31 YALE L. J. 522, which, attacking the problem from the practical aspect, fails to make any distinction between the two situations. See also 22 COL. L. REV. 260.

[10] It has been suggested that the language of § 62 necessarily abrogates the rule